2012 IL App (3d) 110590-U

Order filed October 9, 2012

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2012

IN RE THE MARRIAGE OF	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit,
MARIA E. CUPI	)	Tazewell County, Illinois,
	)	
Petitioner-Appellee	)	
	)	Appeal No. 3-11-0590
v.	)	Circuit No. 05-D-92
	)	
CHRISTOPHER M. CUPI,	)	
	)	Honorable Jerelyn D. Maher,
Respondent-Appellant.	)	Judge, Presiding.
	)	

JUSTICE McDADE delivered the judgment of the court.
Justice Carter concurred in the judgment.
Justice Holdridge concurred in part and dissented in part.

ORDER

¶ 1 *Held*: The trial court's custody judgment was not against the manifest weight of the evidence. The trial court did not abuse its discretion in establishing child support based upon imputed income from respondent's prior employment.

¶ 2 Respondent, Christopher M. Cupi, appeals the trial court's custody judgment awarding

petitioner, Maria E. Cupi, sole custody of the parties two minor children. Respondent also alleges that the trial court erred in establishing child support based upon imputed income from his prior employment. We affirm.

¶ 3 FACTS

¶ 4 The parties were married on June 3, 1994. The parties had two minor children as a result of the marriage: T.C. born on August 6, 1997, and M.C. born on February 23, 2001 (collectively referred to herein as "the children").

¶ 5 Petitioner filed a petition for legal separation of marriage on February 10, 2005. Respondent filed a counter-petition for dissolution of marriage on June 22, 2007, seeking sole custody. Petitioner filed her answer on August 13, 2007, seeking sole custody and child support.

¶ 6 The dissolution of marriage and custody proceedings were bifurcated. On August 8, 2008, an order was entered by the trial court, which incorporated a letter ruling, awarding sole custody of the children to petitioner. A final order establishing a specific child support amount was entered by the trial court on August 10, 2011. The court's custody and child support rulings are the only issues contested in the present appeal.

¶ 7 Custody Evidence and Ruling

¶ 8 The custody trial was held over the course of three days. It is uncontradicted that from the birth of T.C., until January 2006, petitioner was a "stay-at-home-mom" and the primary caregiver and respondent worked full time at Caterpillar and was the primary breadwinner. During this time, petitioner or petitioner's mother would transport the children to and from school 90% of the time. Petitioner almost exclusively provided the medical care for the children. Petitioner was the parent who usually met with the childrens' teachers and was primarily involved

in the childrens' sports and extracurricular activities. She served as a recess monitor at the childrens' school approximately three days a week.

¶ 9 In 2002, the parties began purchasing homes to remodel and resell. Respondent testified that he would work on the houses a few evenings a week. He would get home from his full-time employment at Caterpillar, spend a little bit of time with the children and then head off to one of the parties' purchased homes to do some work. Respondent stated that on nights he did remodeling work he would spend maybe a half hour to an hour with the children. The children would often be asleep by the time respondent returned home. Respondent stopped "flipping" houses in February 2006.

¶ 10 In 2006, petitioner entered the workforce. She attended the Police Training Institute (PTI) in Champaign, Illinois from February 2006 until May 2006. During these four months, petitioner lived in Champaign weekly and saw the children on weekends. Respondent, with some assistance from petitioner's mother, cared for the children during this period of time. Respondent would drive the children to Champaign every Wednesday to see petitioner.

¶ 11 Upon graduation, petitioner obtained employment as a third-shift police officer for Bradley University. Petitioner's schedule was approximately 11:00 p.m. until 7:00 a.m. with an occasional double shift. Her off days would change weekly. Petitioner's mother admitted that petitioner's sleep schedule was "sporadic" and she was often tired. Petitioner, however, stated that her third shift schedule is more conducive to the children's schedule because she is away when they are sleeping. Petitioner planned to have her mother watch the children when she was at work if she was awarded custody.

¶ 12 At approximately the same time petitioner obtained employment, respondent obtained a

promotion at Caterpillar working as a global purchasing manager. This promotion permitted him to have a flexible work schedule, which allowed him to work from home. His new schedule gave him the latitude to take the children to and from school and become more involved in their sports, homework and extracurricular activities. Respondent takes the children to church almost every Sunday and most Wednesday evenings. Since 2006, respondent believes that he is caring for the children 70% of the time. Respondent testified that he virtually has the children all the time unless petitioner has a day off. Respondent stated that no matter the custody determination, he will continue to pay for the children's attendance at Good Shepherd Lutheran School.

¶ 13 Petitioner's mother lived two miles from the parties' marital residence. She would see the children almost daily. She was the "secondary caregiver" or "*de-facto* daycare provider" when the parties were both working or had errands to run. She consistently assisted with the children's transportation needs to and from school. The guardian ad litem (GAL) opined that petitioner's mother "should be very active in *** [the] children's lives" and "continue to provide the care services during the day."

¶ 14 Respondent admitted that he once approached petitioner's mother in her car on the street. Respondent rolled down his window and asked petitioner's mother to pull into a parking lot so that he could get the children out of her car. Petitioner's mother testified that respondent was speeding and driving recklessly. Respondent denied this claim. Petitioner's mother refused to pull over and kept driving because petitioner had asked her to return the children to her.

¶ 15 Respondent testified that petitioner left her service belt, service gun and loaded clips in the mud room of the house where the children would have access to them. Petitioner denied mishandling these items, asserting these items were safely secured. Petitioner testified that she

had never left her gun and magazine or bullets in the same place together, but that respondent had before with his own personal gun. Respondent's expert testified that it is unsafe to leave magazines around children because the primer at the bottom of the magazine could detonate on the corner of a bench.

¶ 16 Each party has sought restraining orders or orders of protection against the other. Each party has also accused the other of acting spiteful towards the other and manipulating the children's emotions. For example, respondent, after allegedly being advised he was on speaker phone, stated to petitioner: "You're worthless just like your mother and the apple don't fall far from the tree." Respondent admitted to making this statement, but denied that he knew he was on speaker phone. On another occasion, respondent, after again allegedly being advised he was on speaker phone, stated to petitioner: "Yeah, why don't you sit them (the children) down and let them know that you are a slut and homewrecker." Respondent admitted to calling petitioner a slut, but again denied that he knew he was on speaker phone. Respondent also allegedly claimed that petitioner had no money because all the money he earned was his.

¶ 17 Petitioner, on the other hand, allegedly told the children that respondent was attempting to poison her and that petitioner might molest the children's friends. While petitioner denies both claims, T.C. informed the GAL that petitioner did in fact tell her that respondent was poisoning petitioner' s food and drink and that T.C.'s friends would be unable to go on a trip with her because "their dad might touch them inappropriately." T.C. was adamant with the GAL that respondent has never touched her inappropriately nor acted in a way that makes her feel uncomfortable.

¶ 18 Respondent testified that T.C. told him in "secrecy" that petitioner claimed that he was

attempting to poison her and that he might molest her friends. Respondent subsequently told T.C. to be truthful and tell the GAL about these incidents. The GAL testified that T.C. gave "no indication" that she was telling him about the poisoning or molestation allegations as a result of respondent telling her to do so. Instead, T.C. was very reserved throughout the interview and only answered the questions when the issues were brought up "point blank."

¶ 19 Upon review of the testimony and his report, the GAL recommended that respondent be awarded custody of the children. The GAL made the following statements to the trial court:

> "Most of the conversations we were able to have were about the parents' involvement in their lives which they indicated to me was essentially equal at that point and time. Prior to *** petitioner entering the work force, it seemed pretty clear to me that she was the primary caretaker."
>
> "I asked both girls if either parent would talk about them, about marital issues that were occurring. They each indicated that respondent and petitioner would discuss things with them, but that their mother discussed things with them more than respondent did."
>
> "I asked if there were ever fights in front of them, names called. There seemed to be an equal amount of fighting between the parties, an equal amount of name calling according to what the girls were observing.
>
> Most of which they said their parents went into another

room, but they were still listening as to what was going on. It didn't seem that either party was really taking much care in the girls being exposed to what was happening."

"The third shift is a concern to me and has been. *** [M]y notes indicate that petitioner, her shift, she would leave at approximately 10:30 p.m. when she worked and return home at approximately 7:30, and then according to my notes, both the grandmother and petitioner, that petitioner would sleep until approximately 12, 3 o'clock in the afternoon – [l]eaving, if the children go to bed at 8:30, 9, very little time that the children are actually spending with petitioner, but two-thirds of the day being spent with the grandmother as opposed to the father being home, available and willing to have the children with him."

My most concerning issue is what was being discussed with the kids by petitioner. It seemed that respondent, while using inappropriate language with petitioner, which may or may not have been overheard by the children, he was directing it at her. It wasn't appropriate.

I think he knows that. If not, it's clear everybody else, it was inappropriate. But from what the girls were telling me, especially T.C., she was being directly involved in what was going on with this divorce.

> I don't think that that is appropriate. I think that was very poor judgment on the part of petitioner, and how that is going to reflect on the child at this point, I am not sure. But my recommendation heavily weighed on that, would still be that respondent be granted custody."

¶ 20 Ultimately, the trial court awarded custody to petitioner. While the court stated it considered the GAL's report and statements to the court, it did not address the GAL's recommendation. The court, however, did make the following findings: (1) this is a close case on sole custody, (2) the children want to spend equal time with their parents, (3) the children get along with both parents, (4) both parties continue to count on petitioner's mother to watch the children, (5) no matter the future living arrangements, it is anticipated that the children will continue to do well in their school and community, (6) the mental and physical health of both parties is "fine," (7) there is no affirmative evidence of domestic abuse, (8) neither parent is a sex offender, (9) petitioner and respondent both "corrected" any perceived threat with regard to their firearms, (10) respondent's gun expert's testimony had "very little impact on the outcome in this case," and (10) evidence of each party's temper has surfaced throughout the proceedings, however, the confrontation between respondent and petitioner's mother on the road was "disturbing" since the children were present.

¶ 21 The court, in its letter order, also stated:

> "Petitioner's third shift job does lead to some strange and erratic sleep hours, but such is the nature of said shift work and should not disqualify an otherwise capable parent from an award of

> sole custody, especially when such parent is as committed to her children as petitioner and when suitable arrangements for the children are otherwise taken care of.
>
> ***
>
> The court finds that respondent, even while trial was pending, has been more likely to inhibit a close and loving relationship between the children and their mother. There are numerous examples of bad judgment exhibited by respondent to support this conclusion, including, but not limited to, his admitted 'bad joke' about monetary matters and his recent admitted 'ignorant' comments to petitioner while on the phone that the children overheard (whether respondent intended this to be heard or not). This is not to say petitioner's judgment has been flawless, but the Court does find that respondent has consistently acted in a manner to lend support to petitioner's accusation that respondent told her he would do anything to get custody of the children.
>
> Much was made of the parties' work schedules at trial. Respondent has a flexible schedule that seems more stable than respondent's. However, he still relies heavily on petitioner and petitioner's mother for arrangements for the children. In fact, he stated at trial he would have no problem with petitioner watching the children during the day. He has also eliminated most non-Caterpillar work activities which will allow him to spend more quality time with the children as addressed below. While it would certainly 'work' if respondent had custody and had petitioner and

her mother make most of the arrangements for the children's day time supervision, transportation and medical appointments, it is the second best option in this case. Some arguable level of added 'convenience' does not outweigh the more substantial benefits the girls will obtain by petitioner's sole custody of them. The court does find that petitioner was the primary care giver in the children's formative years and does not fault her at all (in fact she should be commended) for starting a law enforcement career. The Court also commends respondent's life/work style changes in the last few years that have certainly proven himself to be an involved and quite capable parent. This Court finds his motivation, however, is not only the best interests of the children, but also a not entirely subtle goal of 'winning' custody while petitioner 'loses' custody."

¶ 22 Child Support Evidence and Ruling

¶ 23 On October 22, 2008, the trial court ordered respondent to pay petitioner child support of $600 per month on a temporary basis without prejudice. On December 3, 2008, respondent filed a petition to modify child support alleging his employment was "involuntarily terminated." Petitioner filed a motion to strike alleging she had been informed that respondent "was fired due to his own actions."

¶ 24 Respondent testified in the bifurcated dissolution proceeding that he was fired because he did not have control over his staff. Specifically, he stated:

"Basically had to do with me my staff [sic]. I had a staff

member supposedly had an affair with a supplier and that I supposedly knew about that, and it was all staff related. I didn't have control over my staff. *** My employee did not have an affair with his supplier, which I was accused that she did and that I knew about, which I did not, so the allegations were false."

¶ 25 Respondent allegedly hired an attorney to pursue a wrongful termination claim against Caterpillar. Respondent received unemployment benefits. On September 1, 2009, respondent testified that he has not had one in-person interview since he was terminated. He expended an average of approximately one hour a week looking for jobs.

¶ 26 Respondent's financial affidavit, dated October 7, 2009, stated that he was working for his father. On February 16, 2011, respondent testified that he had not applied for any jobs over the previous six months. Respondent was still working for his father at this time.

¶ 27 On April 13, 2011, the trial court when considering respondent's child support obligation stated:

"What strikes this Court in this case is the *Armstrong* principle. If during the time you were under the Statutory, Section 505 obligation to pay support, which were here, and if the obligor engages in a bad faith termination, it is this Court's ruling the obligor cannot use lower pay jobs as a basis for child support.

Indeed, respondent received unemployment compensation ultimately. That determination alone is an administrative agency's determination, it is not binding on this Court. There remains

undisputed that respondent was fired for misconduct [sic].

There is no competent evidence to contradict this conclusion. As I said, getting unemployment is an administrative decision. I was not provided a transcript, I was not provided how that came about. It's administrative. It's not binding on me.

Second of all, I had the opportunity to review the entire evidence in this regard, the credibility thereof and the lawsuit that supposedly arose out of this. I simply find he was fired from a high paying job, to a much lower paying job paid by his father."

¶ 28 On April 28, 2011, the trial court found that respondent was earning approximately $90,000 at Caterpillar. The court held that "child support shall be established at 28% of respondent's income as defined by statute on the date of his termination from Caterpillar." The court also found that respondent "is now working for his father earning approximately $32,500 gross annually." Respondent's motion to reconsider was denied.

¶ 29 ANALYSIS

¶ 30 Custody Determination

¶ 31 Respondent argues that the trial court's custody judgment was against the manifest weight of the evidence. Because the record reveals that the trial court considered the factors announced in section 602 of the Illinois Marriage and Dissolution of Marriage Act (Marriage Act) (750 ILCS 5/602 (West 2010)) and there is evidence supporting the court's factual findings, we hold it was not against the manifest weight of the evidence to award petitioner sole custody of the children.

¶ 32 In determining custody, the primary consideration is the best interest and welfare of the children involved. *Johnston v. Weil*, 241 Ill. 2d 169, 176 (2011). Under section 602 of the Marriage Act, the court is to consider "all relevant factors" including the following in determining the best interest of the children:

> "(1) the wishes of the child's parent or parents as to his custody;
>
> (2) the wishes of the child as to his custodian;
>
> (3) the interaction and interrelationship of the child with his parent or parents, his siblings and any other person who may significantly affect the child's best interest;
>
> (4) the child's adjustment to his home, school and community;
>
> (5) the mental and physical health of all individuals involved;
>
> (6) the physical violence or threat of physical violence by the child's potential custodian, whether directed against the child or directed against another person;
>
> (7) the occurrence of ongoing or repeated abuse as defined in Section 103 of the Illinois Domestic Violence Act of 1986, whether directed against the child or directed against another person;
>
> (8) the willingness and ability of each parent to facilitate

and encourage a close and continuing relationship between the other parent and the child; and

(9) whether one of the parents is a sex offender." 750 ILCS 5/602 (West 2010).

¶ 33 The trial court's custodial decision rests on the temperaments, personalities and capabilities of the parties, and the trial judge is in the best position to evaluate these factors. *Prince v. Herrera*, 261 Ill. App. 3d 606, 612 (1994). An appellate court will afford great deference to the court's determination in recognition of its far superior position for evaluating the parents, children, and all other evidence. *Prince*, 261 Ill. App. 3d at 612. Accordingly, the appellate court will not disturb the trial court's ruling on appeal unless it is against the manifest weight of the evidence. *Prince*, 261 Ill. App. 3d at 612.

¶ 34 Respondent contends the trial court failed to give adequate weight to (1) "respondent being the primary caretaker of the children," (2) "respondent providing more stability for the children," (3) "respondent better facilitating a relationship between the children and the other parent," (4) "petitioner's sleep deprivation and reckless firearm storage concerns," and (5) "domestic violence and abuse by petitioner."

¶ 35 In essence, respondent's argument is simply a request to reweigh the evidence, which we will not do. *In re Marriage of Pfeiffer*, 237 Ill. App. 3d 510, 513 (1992). First, we note that the record belies respondent's claim that he is currently the primary caretaker of the children. The record reveals that the parties appear to be sharing their parenting responsibilities equally. The GAL's statement to the court confirms this fact: "[T]he parents' involvement in their (the children) lives *** was essentially equal at that point and time (after 2006)."

¶ 36 Second, the trial court expressly rejected respondent's argument that he was able to provide more stability for the children. The record supports this finding. We stress that petitioner was the primary caretaker of the children up until 2006. Thus, petitioner has handled the majority of the children's schooling, care and medical needs over the course of their life. Moreover, the record establishes that petitioner is at the very least, currently able to handle all of her parenting responsibilities during the afternoon and evening. If she is, however, unable to handle her responsibilities in the mornings after she works third shift; petitioner's mother, who has consistently been involved in the children's lives, cares for the children.

¶ 37 Respondent calls our attention to the fact that his employment offers him a flexible schedule, while petitioner works third shift. We note, however, that the trial court, in making its custody determination, expressly recognized respondent's flexible schedule. The trial court, however, in weighing *all* the evidence believed that overall the children would receive more "substantive benefits" if petitioner were awarded sole custody. "It is not the function of this court to reweigh the evidence or assess the credibility of testimony and set aside the trial court's determination merely because a different conclusion could have been drawn from the evidence." *Marriage of Pfeiffer*, 237 Ill. App. 3d at 513.

¶ 38 While not imperative to the disposition of this appeal, we take judicial notice of the fact that respondent is no longer employed by Caterpillar, the company that provided him with the flexible schedule. This court may take judicial notice of matters of common knowledge or facts that are easily verifiable. *Harris Trust & Savings Bank v. American National Bank & Trust of Chicago*, 230 Ill. App. 3d 591, 597 (1992). It is unclear what type of schedule respondent is currently working at his father's business.

¶ 39 Third, the trial court expressly rejected respondent's assertion that he is better at facilitating a relationship between the children and the other parent. While T.C.'s statements to the GAL do give us concern, we defer to the trial court's factual finding that respondent is "more likely to inhibit a close and loving relationship between the children and their mother." Initially, we note that respondent admitted to instructing T.C. to inform the GAL about petitioner's alleged claims that respondent was poisoning petitioner and may molest T.C.'s friends. Moreover, the trial court expressly found that respondent made multiple offensive comments to petitioner on the phone, which the children heard. The court also found respondent's behavior of confronting petitioner's mother on the road, while the children were present, to be "disturbing." Because the trial court was able to evaluate the temperaments, personalities and capabilities of the parties, and there is evidence of respondent inhibiting a positive relationship between the children and petitioner, we afford deference to the trial court's factual finding. To reject the trial court's factual finding, as respondent urges us to do, would require us to reweigh the evidence and make our own, independent assessment of the various witnesses' credibility. This we may not do. See *Marriage of Pfeiffer*, 237 Ill. App. 3d at 513.

¶ 40 Fourth, we reject respondent's claim that the trial court failed to give adequate weight to petitioner's alleged sleep deprivation and reckless firearm storage concerns. The record lacks any affirmative evidence that petitioner *actually* suffers from sleep deprivation. Moreover, respondent failed to establish any nexus between this alleged sleep deprivation and any negative impact on the children. With regard to the firearm claim, the trial court expressly found that any threat by either party was "fleeting" and "has been corrected." The record is devoid of any evidence to the contrary.

¶ 41 Fifth, the trial court expressly held that "there is no evidence of ongoing abuse as defined in the Illinois Domestic Violence Act" of 1986 (750 ILCS 60/101 *et seq.* (West 2010)). While respondent concedes there is "not significant evidence of domestic violence," he cites two alleged instances where petitioner hit him two or three times in 1997 and recently told him she would put a bullet in his head. The trial court heard this testimony and obviously rejected these claims. We will not reweigh the evidence. Instead, we defer to the trial court's factual finding.

¶ 42 For these reasons, we find that the trial court's determination awarding petitioner sole custody was not against the manifest weight of the evidence. While we acknowledge that the GAL recommended that respondent be awarded sole custody, a GAL's recommendation is not dispositive on the issue of child custody. Instead, a trial court must consider all relevant factors announced in section 602 of the Marriage Act. The record in the present case confirms that the trial court carefully weighed and analyzed each 602 factor. Finally, we emphasize that the question before us on appeal is not whether we could have come to a different custody determination had we been in the role of the trial court; the question is whether the trial court's custody determination is against the manifest weight of the evidence. Bound by our standard of review, we answer this question in the negative.

¶ 43 Child Support

¶ 44 Respondent also argues that the trial court abused its discretion in "imputing his Caterpillar income for child support." Because respondent's own conduct of failing to control his staff was the reason he was terminated, we find the trial court acted within its discretion in imputing respondent's previous Caterpillar income when determining his child support obligation.

¶ 45 Recently, in *Gosney v. Gosney*, 394 Ill. App. 3d 1073, 1077 (2009), this court stated the following:

> "Once a change in circumstances has been established, the court must set child support payments based on relevant statutory factors. [Citation.] In reaching the proper amount of child support, the court must first determine the noncustodial parent's net income. [Citation.] In many cases, net income may be difficult to ascertain and an impediment to determining an award of support. It is well established that courts have the authority to compel parties to pay child support at a level commensurate with their earning potential. [Citation.] If present income is uncertain, a court may impute income to the payor. [Citation.]
>
> The imputation of income arose in response to noncustodial parents who experienced a reduction in income and sought a corresponding decrease in child support. When the custodial parent questioned the motives of the payor, courts answered by imputing income when appropriate. [Citations.] Illinois appellate courts have developed three primary factors to consider in determining when it is proper to impute income to a noncustodial parent. In order to impute income, a court must find that one of the following factors applies: (1) the payor is voluntarily unemployed [citation]; (2) the payor is attempting to evade a support obligation [citation];

> or (3) the payor has unreasonably failed to take advantage of an employment opportunity [citation]. If none of these factors are in evidence, the court may not impute income to the noncustodial parent."

¶ 46 Here, respondent admitted he was fired because he did not have control over his staff. In light of this admission, we find the holding in *In re Marriage of Imlay*, 251 Ill. App. 3d 138 (1993) to be dispositive as to the question of whether respondent's termination and subsequent unemployment was voluntary or involuntary.

¶ 47 In *Imlay*, the respondent had been fired from his job as a salesman. The evidence indicated he had been convicted of driving under the influence (DUI) and lost his license, which hampered his ability to make in-person customer calls. Respondent also failed to maintain sufficient telephone contacts with his customers following his DUI conviction. After he was fired, respondent sought a reduction in his child support obligations. Even though the change in employment had been 'technically involuntary,' the *Imlay* court found many of the events underlying respondent's discharge to be within respondent's control, thus justifying the denial of a reduction in child support. *Imlay*, 251 Ill. App. 3d at 141-42.

¶ 48 In light of *Imlay* and respondent's own admission, we conclude respondent is voluntarily unemployed. Accordingly, the trial court acted within its discretion in imputing respondent's previous Caterpillar income when determining his child support obligation.

¶ 49 As an alternative basis to affirm,[1] we also find that respondent's actions constitute nothing

[1] It is well settled that we may affirm the trial court on any basis contained in the record. *Cwik v. Giannoulias*, 237 Ill. 2d 409, 424 (2010).

short of attempting to evade his support obligation. Respondent's failure to manage his staff resulted in him being fired from a job paying him $90,000 a year. His subsequent employment search consisted of approximately one hour a week, which resulted in no in-person interviews. He then began working for his father for $32,000 a year. On February 16, 2011, respondent testified that he had not applied for any jobs over the previous six months. Considering the totality of the circumstances, we find that respondent is attempting to evade his support obligation.

¶ 50 For the foregoing reasons, we affirm the judgment of the trial court.

¶ 51 Affirmed.

¶ 52 JUSTICE HOLDRIDGE, concurring in part and dissenting in part.

¶ 53 I concur with the majority's conclusion that the trial court did not abuse its discretion in awarding sole custody to the petitioner.

¶ 54 I disagree, however, with the majority's decision upholding the trial court's child support award and I dissent from that holding. I would find that the trial court abused its discretion by imputing the respondent's income from his prior employment when determining his support obligation. The majority finds that the trial court correctly found that the respondent was "voluntarily" unemployed when he was discharged from his employment at Caterpillar. See *In re Marriage of Imlay*, 251 Ill. App. 3d 138, 141-42 (1993). Voluntary unemployment generally occurs when the payor terminates his own employment. See *In re Marriage of Gosney*, 394 Ill. App. 3d 1073, 1077 (2009); *In re Marriage of Adams*, 348 Ill. App. 3d 340, 244 (2004); *In re Marriage of Sweet*, 316 Ill. App. 3d 101, 106 (2000). Of all reported cases on voluntary unemployment or underemployment, *Imlay* appears to be the only case where a court held that termination by the employer constituted "voluntary" unemployment by the payor.

¶ 55 I would find that *Imlay* rests on its own unique facts and is not dispostitive in the instant matter. As the majority noted, in *Imlay*, the payor was a traveling salesman who lost his driver's license as the result of a DUI conviction. The lack of a driver's license made it difficult, but not impossible, to contact his sales clients. The record established that the payor in *Imlay*, after losing his license, made no attempts to contact his clients by phone, even though that was an avenue of communication that was easily available to him. The record also established that this lack of attention to his customers occurred over a nine month period. The record further established that the employer counseled the payor that he should be taking steps to correct his actions, but the warnings went unheeded. Consequently, when he could not achieve his previously-established sales quotas, the payor was terminated. Given these facts, the *Imlay* court found that the trial court did not abuse its discretion in finding that the payor's actions, committing the DUI offense, losing his driver's license, and failing to take any steps to contact his clients, were within the payor's control and thus justified the denial of his request for a reduction in his child support obligation. *Imlay*, 251 Ill. App. 3d at 141-42.

¶ 56 Contrasting the facts in *Imlay* with those in the instant matter, the trial court's determination here was not supported by the record. The record in the instant matter established only that the respondent's employment was terminated by his employer for a single performance related issue, *i.e.*, the inability of a supervisor to control the actions of his subordinates. Nothing in the record supports a conclusion that the respondent's termination was within his control as was clearly the case in *Imlay*. In *Imlay*, the appellate court explained in great detail how the record established that the payor's conduct leading to his discharge was "deliberate and his discharge was not merely a fortuitous occurrence." *Imlay*, 251 Ill. App. 3d at 141. The *Imlay*

court supported this finding with a detailed description of the actions or inactions of the payor in that case which evidenced a clear intent on his part to "voluntarily" abandon his employment. The contrast between the record herein and the *Imlay* case is stark. Unlike the extensive evidence of purposeful actions by the payor which led to his termination, here, we have only the one isolated instance of the respondent being discharged for a single instance of alleged poor performance of his duties as a supervisor. The record contains nothing more than the suggestion that he took any actions which would evidence a purposeful disregard of his job duties and responsibilities.

¶ 57 Given the lack of any facts in the record to support a finding that the respondent's employment was terminated for anything other than a single act of poor performance, the majority's reliance upon *Imlay* is misplaced. The holding in *Imlay* does not stand for the proposition that a single act of poor performance which results in discharge renders that discharge "voluntary." The majority's holding in the instant matter would render any terminations for even one infraction "voluntary" and would, in effect, turn every employment termination into a purposeful attempt to evade a child support obligation. Such an arbitrary and capricious conclusion is not supported by the facts in this case and does not comport with the goal of preventing a payor from "purposefully" evading a child support obligation. *Sweet*, 316 Ill. App. 3d at 107-08.

¶ 58 I would find, therefore, that the record did not support a finding that the respondent was voluntarily unemployed, and I would reverse that finding by the trial court. I would remand the matter to the circuit court for a proper child support determination.